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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 826

F. J. BUCKLEY, doing business under the fictitious firm name and style of F. J. BUCKLEY & Co.,

Petitioner,

vs.

WYNNE A. SAVAGE, as Real Estate Commissioner of the State of California,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

A. Opinion Below.

Petitioner seeks a review of a final decision of the District Court of Appeal of the State of California, Second Appellate District, which decision affirmed a judgment of the Superior Court of the State of California in and for the County of Los Angeles. The decision is reported at 184 Advance California Appellate Reports, 17, 7 Cal. Rep. 328. The written decision of the Superior Court which consists of its Findings of Fact and Conclusions of Law,* is found

*See Section 632 of the California Code of Civil Procedure.

at the Clerk's Transcript on the Appeal from the Superior Court at pages 32-43.

(As has been done by petitioner, respondent will make reference to this Clerk's Transcript as "R. p. .....")

B. Absence of Grounds of Jurisdiction.

Jurisdiction under Title 28 United States Code, Section 1257, subdivision 3, as claimed by petitioner, is not present.

The District Court of Appeal determined that the mere fact that an administrative agency adopted the proposed decision of a hearing officer on the same day it was rendered did not establish that said agency had not read, reviewed or reflected upon the record of the administrative proceedings if such were necessary. *Buckley v. Savage*, 184 A. C. A. 17, 31, 7 Cal. Rep. 328, 337.

The District Court of Appeal also held that it mattered not whether petitioner had been acting as a licensee in the transaction which led to his discipline where discipline was imposed under Section 10177 of the California Business and Professions Code. Since discipline was imposed under said section independently of discipline under Section 10176 (which does require that misconduct occur while acting as a licensee), the discipline must stand even had respondent not been acting as a licensee. *Buckley v. Savage, supra*, 30, 32, 7 Cal. at 337-338.

Respondent submits that these decisions do not affect the legal rights of petitioner arising under the Due Process clause of the Fourteenth Amendment of

the Constitution of the United States. Respondent further submits that the alleged federal questions presented by petitioner are not substantial and were not properly presented to the State courts.

QUESTIONS PRESENTED.

Before the questions posed by petitioner are to be answered, there must first be answered two questions: (1) Were these questions properly presented to the State court; (2) Do they present substantial federal questions:

STATEMENT OF THE CASE.

Respondent Real Estate Commissioner is the administrative agency empowered under the provisions of Sections 10150 and 10151 of the California Business and Professions Code to license persons to act as real estate brokers in the State of California and under the provisions of Sections 10176 and 10177 of the California Business and Professions Code to suspend or revoke such licenses for causes specified therein.

In the case at bar, a disciplinary action in the form of an accusation was filed with the respondent charging the petitioner with purchasing property for himself without disclosure of this fact to his principal and other misconduct related thereto. [R. p. 4.] A hearing on the accusation was held before a hearing officer whose proposed decision was that there had been such a purchase without disclosure, and that grounds for suspension or revocation of the license existed under the provisions of Sections 10176 and 10177 of the Business and Professions Code. He recommended that the license be revoked. [R. pp. 12-18.] Respondent adopted

this proposed decision as his own [R. p. 19], revoked petitioner's real estate broker's license, and denied petioner's request for reconsideration of his case. [R. p. 5.]

(The record does not support Petitioner's contention that there was no independent consideration by the respondent in adopting the proposed decision of the hearing officer.*)

In this proposed decision it was found that Mrs. Slusher, the principal, "orally employed petitioner *as a real estate licensee* for a period of 60 days, for the purpose of effecting a sale of the property . . . for the total purchase price of $35,000.00, with the provision that petitioner would receive a commission in the amount of 5% on the sale price thereof" It was further found that this employment was orally extended for an additional indefinite period and that petitioner, during the above 60-day period and thereafter, attempted to negotiate a sale of the property. [R. p. 13; emphasis added.]

The trial court which reviewed the respondent's decision and which may reweigh the evidence to determine whether the evidence supports the respondent's findings of fact,** made the same findings. [R. p. 35.]

On February 20, 1959, petitioner filed with the Superior Court, a trial court, his Petition for Writ of Mandate directing the respondent to set aside his decision. [R. pp. 1-19A.]

Infra, p. 8.

**Infra*, pp. 11-12.

The allegations therein pertinent to this matter are as follows:

1. "That the Findings contained in the Proposed Decision of the Hearing Officer are not supported by the evidence:

(a) In that such Findings, in general, hold that petitioner was acting as a real estate broker;

. . .

(b) In that such Findings do not find upon the necessary and essential element that petitioner acted for a compensation or in expectation of a compensation in the doing of acts set forth in section 10131 of the Business and Professions Code of the State of California (as amended in 1935), for another or others, it being indicated in such Findings that petitioner acted and was acting for his own benefit or profit. [R. pp. 7-8]; and

2. "That the decision of the respondent was arbitrary, capricious and constitutes the depriving petitioner of due process or a fair proceeding, including the making of such Decision, in that petitioner, is informed and believes and upon information and belief alleges, that such Decision was made on the same day, contemporaneously and concurrently with said Proposed Decision, and without the exercise of any independent judgment, consideration or discretion on the part of the respondent. [R. p. 9.]"

Respondent denied the above allegations. [R. pp. 20-23.]

The Superior Court held that respondent's findings were supported by the weight of the evidence, that petitioner received a full and fair hearing, and that respondent did not act arbitrarily or capriciously in adopting the Proposed Decision of said Hearing Officer as his own on the same day on which said Proposed Decision was rendered. [R. pp. 40-41.] The petition for a writ of mandate was denied.

This judgment of the Superior Court was affirmed on appeal to the District Court of Appeal. The latter court held that there was nothing before it to indicate that the respondent did not read the transcript of the administrative proceedings, even if such were required. *Buckley v. Savage, supra,* 31, 7 Cal. at 337.

It further held that since discipline under section 10177 of the Business and Professions Code does not require that the misconduct have occurred while one has acted as a licensee, and since revocation of the license was ordered under that section independently of the revocation ordered under Section 10176 of said code, it was not material whether petitioner had or had not been acting as a licensee. *Buckley v. Savage, supra,* 30, 32, 7 Cal. at 337, 338. In any event, said the court, both the findings of the respondent and the trial court, as well as the fact that discipline was also imposed under Section 10176 of the California Business and Professions Code, led unmistakably to the conclusion that Buckley was working for a compensation

(and, hence as a licensee). *Buckley v. Savage, supra,* 29-30, 7 Cal. at 336.

In his petitions for a rehearing in the District Court of Appeal and for a hearing in the Supreme Court of the State of California, petitioner addressed himself solely to the question of whether there existed sufficient findings that he had been acting as a licensee, whether the District Court of Appeal might infer such a finding from other findings and/or the fact that respondent had revoked his license, and whether a prerequisite to discipline was that he had been acting as a licensee. In those petitions, petitioner abandoned the issue of whether respondent's alleged failure to read the administrative record before adopting the proposed decision of the Hearing Officer was such that he was deprived of his license without due process of law. The petition for a hearing in the Supreme Court was denied without opinion on October 19, 1960 (54 A. C. No. 28, Minutes p. 2) as had been the petition for a rehearing in the District Court of Appeal on September 12, 1960 (184 A. C. A. No. 4, Minutes p. 3).

REASONS FOR NOT GRANTING THE WRIT.

I.

The Question of Whether the Deciding Officer Must "Hear" the Matter Was Not Properly Presented to the State Courts and Does Not Present a Substantial Federal Question.

A. No Proper Presentation to the State Court.

Petitioner claims a right to have had the respondent "read, review or reflect" upon the administrative record before making a decision to revoke his real estate broker's license. (Pet. Wr. Cert. p. 9.) Petitioner's only evidence that respondent did not so act is the fact that respondent adopted the hearing officer's proposed decision on the same day that it was rendred. The District Court of Appeal said that such "does not indicate that the Commissioner did not read the transcript in the proceedings, even if such were required." *Buckley v. Savage, supra,* 31, 7 Cal. at 336. Petitioner comes before this court asking for a factual determination that respondent did not "read, review or reflect upon" the administrative record in making his decision when there has been no finding in the state courts to that effect. Determinations of fact are not ordinarily made the subject of inquiry of this court.

Furthermore, petitioner has not presented to the State court the contention that the alleged failure of the respondent to reflect upon the administrative record deprives him of property as against the Fourteenth Amendment of the Federal Constitution. Reference

to this issue in his Petition for Writ of Mandate to the Superior Court is as follows [R. p. 9]:

> "That the decision of the respondent . . . constitutes the depriving petitioner of due process . . . in that petitioner . . . alleges that such decision was made . . . . without the exercise of any independent judgment, consideration or discretion on the part of the respondent."

The Constitution of California contains a due process clause.* Under these circumstances the reference to due process is solely referable to the State constitution and affords no basis for invoking the jurisdiction of this court. *Bowe v. Scott*, 233 U. S. 658, 664-665. The only reference made by petitioner to the Fourteenth Amendment of the Federal constitution or due process thereunder is at page 43 of petitioner's Opening Brief to the District Court of Appeal. But reference there was to the issue of whether the accusatory pleading in the administrative proceeding could be amended on the day of the hearing.

In no way did the petitioner present this question to the Supreme Court of California in his Petition for Hearing addressed thereto. That petition is as devoid of reference to the issue as is the petition herein devoid of a reference to the record to support the statement that "[t]hese issues were raised in the petition for hearing

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*. . . [N]o person shall . . . be deprived of life, liberty, or property without due process of law; . . ." (Constitution of California, Article I, section 13.)

filed in the Supreme Court of the State of California." (Pet Wr. Cert. p. 6.) Since this alleged federal question was not presented at all to the California Supreme Court, or to the District Court of Appeal on petition for rehearing, the petition should be denied. (*Chandler v. Manifold*, 290 U. S. 665; *Dorrance v. Pennsylvania*, 287 U. S. 660.)

B. No Substantial Federal Questions Are Presented.

Had it been established that respondent did not read, review or reflect upon the administrative record before adopting the proposed decision of the hearing officer, still no substantial federal question exists. The hearing officer's proposed decision may be considered as a sifting and analysis of evidence and report to the respondent who then makes his decision upon the report submitted. This proposed decision contains detailed findings of fact and reasons for the proposed revocation. Even under the first *Morgan* case upon which petitioner relied so heavily this procedure does not deny one due process. *Morgan v. United States*, 298 U. S. 468, 481-482.

Even were the mere reading and adoption of a proposed decision not considered a "hearing" of the testimony and argument, no substantial federal question is presented because, as has been suggested by Professor Davis in his treatise on administrative law, "the Federal Constitution no more prevents vesting the power of decision in referees who have heard the witnesses than it prevents vesting the power of decision in judges who have heard the witnesses." 2 Davis, Administrative Law Treatise, p. 57; see also: *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 393-401, 184 P. 2d 323,

328-333; *Fifth St. Pier Corp v. City of Hoboken*, 22 N. J. 326, 329-335, 126 A. 2d 6, 7-11.

If respondent did not exercise his independent judgment on the record, the decision was not his but the hearing officer's. But this latter official did "hear" the case, over and beyond the requirement of the *Morgan* cases. Thus, he who decided did also "hear".

One further factor must be considered here. As pointed up in *Hohreiter v. Garrison, supra*, at pp. 401-402, the Superior Court, in reviewing the action of respondent, reweighs the evidence and exercises an independent judgment upon the facts.* Since auditory reception of evidence is by no means required by the *Morgan* cases, the Superior Court's decision, after a review of the evidence and arguments at the administrative hearing, that the revocation was proper, affords due process of law. See also *Cooper v. State Bd. of Medical Examiners*, 35 Cal. 2d 242, 246-247, 217 P. 2d 630, 633.

Petitioner contends that the Superior Court merely looks for substantial evidence to support the respondent's findings and cites *Damiani v. Albert*, 48 Cal. 2d 15, 17, and *Aluisi v. County of Fresno*, 159 Cal. App. 2d 823. (Pet. Wr. Cert. p. 12.) However, such is not the case. Where the Superior Court reviews the decision of a state administrative agency which has suspended or revoked a license, that court reweighs the evidence unless the agency has been given quasi-judicial power by the Constitution of the State of California. In the latter instance, the court need merely determine whether any substantial evidence exists to support the

Infra, pp. 11-12.

finding as is also the case where the findings of a local agency are being considered. See 2 Cal. Jur. 2d 363 *et seq.*, Administrative Law §§220-221. Respondent is a state administrative agency which has not been given quasi-judicial powers by the State constitution, but rather by statute. Therefore, there is a reweighing of the evidence by the Superior Court. The District Court of Appeal stated:

> "It is . . . apparent that the trial court exercised an independent judgment upon the whole matter."
>
> *Buckley v. Savage, supra*, 31, 7 Cal. at 338.

II.

The Contention That There Is No Finding by Either the Hearing Officer or the Superior Court That Petitioner Had Been Acting in the Capacity of a Real Estate Licensee in the Transaction Upon Which Discipline of His License Was Based Does Not Present a Substantial Federal Question nor Was Such Federal Question Properly Presented to the State Courts.

A. No Proper Presentation to the State Courts.

While petitioner has urged during the proceedings before the California courts that the Superior Court and the respondent did not find that he was acting in the capacity of a licensee, never was it contended that this failure lead to his license being revoked without due process of law as against the Fourteenth Amendment of the Federal Constitution. Rather, petitioner urged in the Superior Court at the trial level that while the findings in general found him to have been acting as a real estate broker, such findings were unsupported

by the weight of the evidence. [R. p. 7.] Petitioner's briefs to the District Court of Appeal, Petition for Rehearing addressed thereto, and Petition for Hearing in the California Supreme Court, while urging the lack of findings and the necessity of such for discipline under the California law, did not urge that these omissions were such that he was deprived of property or liberty without due process of law under the Fourteenth Amendment of the Federal Constitution, or at all. The failure to so present this contention to the State courts leaves this court without jurisdiction to review the matter. *Chandler v. Manifold, supra; Dorrance v. Pennsylvania, supra.*

Furthermore, the question posed by petitioner assumes that neither respondent nor the trial court made findings on the question of whether petitioner had acted as a licensee and that the District Court of Appeal looked solely to the fact that discipline had occurred to infer such a finding. The District Court of Appeal, however, stated: "Both the findings of respondent and the findings of the trial court contain findings of the underlying facts which lead unmistakably to the conclusion that Buckley was working for compensation." *Buckley v. Savage, supra,* 30, 7 Cal. at 336. And, hence, as a licensee.

Respondent found, as did the trial court, that Mrs. Slusher "orally employed petitioner as a real estate licensee for a period of sixty days, for the purpose of effecting a sale of the property hereinabove described; that the property was listed with the petitioner for the total purchase price of $35,000 with the provision that petitioner would receive a commission in the amount of 5% of the sale price thereof." [R. p. 13, lines 3-9;

p. 35, lines 6-13.] Respondent and the Superior Court further found that during this sixty-day period and thereafter petitioner "attempted to negotiate a sale of the property." [See R. p. 13, lines 19-21; p. 35, line 29-p. 36, line 1.]

Even if respondent and the trial court had not made findings upon this fact, the Due Process Clause would not prevent the District Court of Appeal from making such findings. In fact, the District Courts of Appeal in the State of California are expressly authorized to make findings in non-jury cases. (Calif. Code Civ. Proc., Sec. 956(a).)

Petitioner cites several cases* of this Court for the the proposition that it is necessary for an administrative agency to make findings on fact upon which its jurisdiction depends. (Pet. Wr. Cert. p. 16.) However, respondent does not believe that the Court there was saying that one is deprived of due process of law where one's license is revoked without an express finding upon some necessary fact.** Rather, the findings were necessary for an intelligent review of the administrative agency's action. And where no inconvenience to the court will accrue, it has been suggested that it may be better to presume a finding on a "jurisdictional" fact rather than march the king's men up and down hills. See *Yonkers v. United States*, 320 U. S. 685, 693-695. (Frankfurter, J., dissenting.)

**Connecticut Co. v. Power Comm'n*, 324 U. S. 499; *Yonkers v. United States*, 320 U. S. 685; *United States v. B. & O. R. Co.*, 293 U. S. 455; *Mahler v. Eby*, 264 U. S. 32.

***See 2 Davis, Administrative Law Treatise, 441-444, Sec. 16.04.

B. Assuming That the Omission of Such a Finding Existed in Fact and Is Such That a Due Process of Law Question Arises From It, the District Court of Appeal Rendered Its Judgment on a Non-Federal Ground so That This Court Has No Jurisdiction.

The District Court of Appeal held that respondent need not have been acting as a real estate licensee in the transaction leading to discipline of his license where discipline was taken under section 10177, subdivision (f) of the California Business and Professions Code. *Buckley v. Savage, supra,* 30, 7 Cal. at 337. Since revocation was imposed by respondent under section 10177 of the California Business and Professions Code, independently and severally of the discipline imposed under section 10176 of said code, the alleged absence of findings necessary for discipline under section 10176 was not a controlling factor in the District Court of Appeal's decision. For where discipline is imposed severally on different grounds, the agency's decision is upheld where any one of the grounds finds support. *Mast v. State Board of Optometry,* 139 Cal. App. 2d 78, 91-93; *Rudolph v. Athletic Commission,* 177 Cal. App. 2d 1, 11-12, 1 Cal. 898; *Buckley v. Savage, supra,* 30, 32; 7 Cal. at 337-338.

CONCLUSION.

Respondent respectfully submits that the petitioner fails to present a substantial federal question requiring this Honorable Court to exercise its jurisdiction in

the matter upon the record and for the reasons hereinabove stated. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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